

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,274

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare reducing her ANFC benefits because her older child is eighteen years old, but is not expected to graduate high school by the time she is nineteen. The legal issue in this matter is similar to Fair Hearing Nos. 11,260 and 11,648, decided by the board on May 17, 1993, and presently on appeal before the Vermont Supreme Court (Dkt. No. 93-342). However, the instant matter differs from the above cases because there is an issue in this matter as to whether the petitioner's daughter is an "individual with a disability" within the meaning of the Americans with Disabilities Act (ADA).

FINDINGS OF FACT

The petitioner is the single mother of two children. The older child turned eighteen on January 18, 1993. At the time, she was a sophomore in high school and did not expect to graduate for two more years--when she was twenty. In February, 1993, the Department reduced the petitioner's ANFC benefits by removing the petitioner's daughter from the petitioner's grant. The petitioner did not appeal this decision in a timely manner. However, in June, 1993, the petitioner reapplied for ANFC asking that the Department reinstate her daughter to the grant. The Department denied this application and this appeal ensued.

The petitioner lived in Connecticut during her daughter's first few years of school. The petitioner's daughter was held back in the first and third grades. Although she never received special education services, her school records from those years show that she couldn't keep up with her work. A psychological assessment done while she was in the second grade included the following assessment, conclusions, and recommendation:

PERSONALITY ASSESSMENT:

[D.] is an unhappy, depressed little girl who has become quite non-communicative. In terms of

relationships, she misses her father who is not in the home, dislikes her brother, has a limited affectionate relationship with her mother and peer relations are poor.

She is experiencing difficulty in coping with her feelings and sensitive emotional questions cause her to avoid them by changing the subject or ending it with "I don't know." Her oral responses were minimal but repetition of a question revealed she would change an earlier response.

Primary problems centers around her home situation with the absence, by divorce, of her father and a less than adequate relationship with her mother.

CONCLUSION:

Although [D's.] test results were in the low average range of intelligence, there appears to be a potential for average functioning.

She is a depressed youngster who does not find satisfaction in her home environment and can not cope with her feelings. She will avoid them or deny them. Consequently, the teacher sees her as an "unhappy child, hardly ever smiles, inward type, negative moods, and erratic worker".

She has been retained and academically seems to be holding her own. At times can do good work in the classroom, but is not consistent.

Unless there are changes within the home, [D.] may begin to lose ground academically. There is a need for outside intervention to help [D.] at this time.

RECOMMENDATIONS:

It will be recommended to her mother that she seek outside counseling for family problems.

The classroom teacher should reduce expectations.

It may be necessary to give her extra time to complete an assignment.

Good work should be overly praised, both orally and with concrete rewards, such as stickers.

Since her ability to attend is marginal, be sure [D.] understands the task before proceeding independently.

When [D.] is in a negative mood, do not criticize but rather, in private, be supportive.

Help her to find a "friend" in the classroom, who can be her buddy.

Write notes of praise to the mother when appropriate, but do not write critical notes.

The records show that the petitioner's daughter made little progress in grades two and three, despite being given special help and accommodations. During those years the family moved several times, and the petitioner's daughter changed schools almost yearly. Nothing in the records, however, suggests that this was a significant cause of her difficulties in school. When the family moved to Vermont after the daughter's third grade year, she repeated that grade.

The daughter's present high school guidance counselor, who has an M.A. in counseling psychology, testified that the daughter has shown "serious signs of depression" that continue to the present time. The counselor reviewed the daughter's records from her early years of school and concluded that she was "depressed" at that time and that this limited her achievement in school and was the primary reason she had to be held back.

Based on this uncontroverted assessment, which is fully supported by the psychological evaluation (supra) done at that time, it is found that the petitioner's daughter has suffered from a long-standing psychological depression that is mostly responsible for her being held back in her first and third grade years. Otherwise, she would have graduated high school by the time she was eighteen.

ORDER

The Department's decision is reversed. The petitioner shall be granted ANFC benefits until her daughter reaches age nineteen.

REASONS

The underlying basis of the Department's decision in this case is a federal AFDC statutory provision, 42 U.S.C. § 606(a)(2), passed by Congress as part of the Omnibus Budget Reconciliation Act of 1981 (OBRA), that defines a "dependent child" as one who is either:

(A) under the age of eighteen, or (B) at the option of the state, under the age of nineteen and a full-time student in a secondary school...if, before he attains age nineteen, he may reasonably be expected to complete the program of such secondary school...

Since 1981, federal and state regulatory provisions have essentially mirrored this language. See 45 C.F.R. § 233.39(b) and W.A.M. § 2301 (in its regulations Vermont adopted the above eighteen-year-old "option").

In the instant case there is no question that the Department's action is in accord with the above provisions. The petitioner's daughter is eighteen, and she will not graduate from high school before she turns nineteen. The petitioner argues, however, that the federal statute and the federal and state regulations (supra) conflict with the anti-discrimination provisions of the Americans with Disabilities Act of 1990 (ADA).

The ADA at 42 U.S.C. § 12132 provides that:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

In this case there is no dispute that the Department is a "public entity" within the meaning of the Act. See 42 U.S.C. § 12131(1). There is also no dispute that the Department, as a recipient of federal funding, is also subject to the similar anti-discrimination provisions of section 504. See 29 U.S.C. § 794.

The only factual issue in this case is whether the petitioner's daughter meets the ADA definition of "disability". In this regard 29 U.S.C. § 706(8)(B) includes the following provision:

Subject to subparagraphs (C),(D), and (F), the term "individual with a disability" means, for purposes of sections 701, 713, and 714 of this title, and titles IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Based on the above findings it must be concluded that the petitioner's daughter meets the above definition, and that it is because of her "disability" that she will not graduate high school before she is nineteen.

The petitioner maintains that the graduation requirements of the federal and state statutes and regulations regarding ANFC eligibility for secondary school students age eighteen and over violate the above anti-discrimination provisions of the ADA and section 504. Section 12131(2) of the ADA provides:

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity.

The crucial question in this case is whether the petitioner's daughter, were it not for her disabilities,

"meets the essential eligibility requirements" of the pertinent ANFC regulations. If so, 28 C.F.R. § 35.130(b)(7) provides:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Incredibly, it appears that no federal or state court has yet considered whether the age and graduation restrictions in the AFDC statutes and regulations violate either the ADA or section 504. However, in promulgating federal regulations to implement the ADA the U.S. Attorney General commented that the following practices were prohibited:

...blatantly exclusionary policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate.

56 F.R. 35694, 35704 (1991). Those comments make specific reference to Alexander v. Choate, 469 U.S. 287 (1985), a United States Supreme Court case decided prior to the enactment of the ADA that considered whether certain time limitations on inpatient hospital coverage under medicaid discriminated against the handicapped in violation of section 504. The comments specify that the anti-discrimination provisions of the ADA are consistent with those in section 504 as interpreted in Choate. Id.

In Choate, the Supreme Court adopted a "meaningful access" test to determine that a "facially neutral" provision in the Tennessee medicaid regulations that limited inpatient hospital coverage to fourteen days did not discriminate against handicapped individuals. Id. at 301. In that case the basis of the plaintiffs' argument was that as a general matter handicapped individuals required longer hospital stays. However, in rejecting this argument the Court concluded that "...nothing in the record suggests that the handicapped...will be unable to benefit meaningfully from the coverage they will receive under the 14-day rule." Id. at 302. However, the Court also made clear that there may well be circumstances in which "...reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." Id. at 301, footnote 21.

While the general eighteen-year-old age limitation in the ANFC program is closely analogous to the fourteen-day medicaid coverage limitation in Choate, the nineteen-year-old graduation requirement is clearly distinguishable. As found above, it is because of the disability of the petitioner's daughter that she cannot accomplish high school graduation before age nineteen. Thus, it must be concluded that the petitioner's daughter is indeed being denied an "effective opportunity to participate" in this aspect of the ANFC program to the same extent as non-handicapped recipients.

Moreover, as an eighteen-year-old high school student the petitioner's daughter "meets the essential eligibility requirements" of the ANFC program in every other respect. Allowing the extension of ANFC benefits to those eighteen-year-old handicapped children who can demonstrate that were it not for their disabilities they would have been able to graduate high school before age nineteen would not constitute a "fundamental alteration" of the ANFC program. Such children would receive no more ANFC than certain other non-handicapped-eighteen-year-old students.

The Department concedes that the purpose of the ADA and section 504 is to "assure that handicapped individuals receive evenhanded treatment". Choate, id. at 304. It is, therefore, concluded, that because the petitioner's daughter is a high school student who, except for her disability, would meet the graduation requirements of 42 U.S.C. § 606(a)(2) and W.A.M. § 2301, under the ADA and section 504 the Department must grant the petitioner ANFC benefits in her daughter's behalf until her daughter reaches age nineteen.

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